IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NATHAN D. BRIGHTMAN, Appellant.	No. 36150-7-II UNPUBLISHED OPINION

Penoyar, A.C.J. — Nathan Brightman appeals his second degree murder conviction, arguing that (1) retrial on his first degree murder charge violated double jeopardy; (2) the trial court denied him his right to a fair trial when it permitted the State and its witnesses to use the term "victim" to refer to the deceased; (3) the trial court erred by allowing a State witness to testify regarding Brightman's alleged employment during the time in question; (4) the trial court erred by denying his motion for a continuance; (5) the trial court erred by submitting an aggressor instruction to the jury; and (6) the cumulative error doctrine mandates reversal in this case. In a statement of additional grounds for review (SAG),[1] Brightman also asserts that the trial court erred by admitting his former girlfriend's testimony. None of his arguments warrants reversal and we affirm.

[1] RAP 10.10.

FACTS

I. 1998 Shooting

We note that the following facts are from *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005), in which the Washington Supreme Court reversed Brightman's second degree murder conviction and remanded for a new trial. This appeal arises from Brightman's second trial, in which a jury again convicted him of second degree murder.

On October 1, 1998, Brightman approached Dexter Villa in the Tacoma Community College parking lot and asked for a ride to Gig Harbor. *Brightman*, 155 Wn.2d at 509. Villa agreed but, instead of driving to Gig Harbor, the pair ended up at a parking area near Titlow Beach. *Brightman*, 155 Wn.2d at 509. According to three witnesses,[2] after Villa parked, the men began fighting inside the car. Then Brightman got out of the car and headed toward the driver's side. Villa jumped out of the car, and the fight continued. *Brightman*, 155 Wn.2d at 509. One witness testified that each man remained on his feet, and it seemed to be a fair fight. *Brightman*, 155 Wn.2d at 509. Another testified that Villa looked like he was trying to get away, but Brightman was holding onto Villa's shirt. *Brightman*, 155 Wn.2d at 509-10. The third testified that he saw Villa waive his hands in fear. *Brightman*, 155 Wn.2d at 510. Each witness saw Brightman shoot Villa. Brightman looked over at one of the witnesses in the parking lot, pulled his coat over his face, got in Villa's car, and drove away. *Brightman*, 155 Wn.2d at 510.

According to Brightman's testimony, when he and Villa were driving away from the

[2] Two witnesses explained that they had been smoking crack for a couple of hours before going to the beach parking area where they witnessed the shooting. The third witness was painting a nearby house and had a bird's eye view of the parking area. *Brightman*, 155 Wn.2d at 509 n.1.

community college, he gave Villa $7 for gas. The conversation turned to parties and drugs, and Brightman claims he gave Villa $20 to get him some marijuana. *Brightman*, 155 Wn.2d at 510. Villa then drove to the parking area near Titlow Beach. *Brightman*, 155 Wn.2d at 510. After Villa parked, he ordered Brightman to get out of his car. Brightman replied that he wanted his money back. Villa leaned across him to open the passenger door, Brightman shoved his hand away, and a fight ensued. *Brightman*, 155 Wn.2d at 510. Brightman claims that he yelled "help me," tried to fight back, and eventually got out of the car. Villa also got out of the car, and the fight continued. *Brightman*, 155 Wn.2d at 510. Brightman testified that both men threw punches and both stayed on their feet. Significantly, Brightman admitted that he resumed the fight once both men were outside of the car, and he had *no fear* of Villa during the fight. *Brightman*, 155 Wn.2d at 510.

Brightman claimed that he eventually drew a gun, intending only to club Villa with it. Brightman hit Villa with the gun twice, and the second time the gun went off. Villa fell to the ground and Brightman panicked. *Brightman*, 155 Wn.2d at 510. He testified that he had the clip in his pocket, and he did not know there was a bullet in the chamber. Brightman picked up his money, threw his coat over his face, got in Villa's car, and drove away. *Brightman*, 155 Wn.2d at 510.

Brightman drove across the Tacoma Narrows Bridge. He tossed the gun and the clip out of the sunroof and off the bridge. They were never recovered. *Brightman*, 155 Wn.2d at 510. A police officer testified that he tried to stop Brightman, and Brightman started to pull over but then sped away. Brightman parked the car on a gravel road, threw the keys in the bushes, and ran

home. *Brightman*, 155 Wn.2d at 510. Later that night, Brightman's friends returned to Villa's car and stole his stereo, CDs (compact discs), and other items. *Brightman*, 155 Wn.2d at 510-11. The police eventually connected Brightman to the shooting, and arrested him. *Brightman*, 155 Wn.2d at 511. The State charged Brightman with premeditated first degree murder and, in the alternative, first degree felony murder based on robbery, on the theory that he was trying to steal Villa's car. The State also charged him with first degree unlawful possession of a firearm.[3] Brightman pleaded guilty to the firearm charge. *Brightman*, 155 Wn.2d at 511.

II. Brightman's First Trial

At the conclusion of Brightman's first trial, the trial court instructed the jury that it should first consider the first degree murder charge and, if it unanimously agreed on a verdict for this charge, complete verdict form A. If it could not agree on a verdict for first degree murder, it was instructed to leave verdict form A blank. The trial court then instructed the jury:

> If you (1) unanimously find the defendant not guilty of [first degree murder], or (2) if after full and careful consideration of the evidence, you cannot agree as to [premeditated first degree murder], then you will consider the lesser crimes of [second degree murder] and [first degree manslaughter].

Clerk's Papers (CP) at 88. During deliberations, the jury submitted the following question to the trial court:

> We are currently deadlocked with some for 1st degree [murder] and some for 2nd degree murder. Our instructions seem to indicate that it is our duty, then, to return a verdict of guilty of 2nd degree murder. (instruction 25, p.7). Is this so? If so, when the jury is polled, how must [the] jurors who prefer "guilty of 1st degree murder" respond?

[3] Brightman had previously been convicted of second degree assault and second degree burglary, making it unlawful for him to carry a firearm. *Brightman*, 155 Wn.2d at 511 n.2.

CP at 94. The trial court responded, "Please carefully read the instructions." CP at 94.

The jury subsequently left verdict form A blank and returned the following verdict on form B:

> We, the jury, having found the defendant: (1) not guilty of the crime of [first degree murder], or (2) having found the defendant not guilty of the crime of [first degree felony murder], and being unable to unanimously agree as to [premeditated first degree murder], find the defendant *Guilty* (not Guilty or Guilty) of the lesser included crime of [second degree murder].

CP at 18 (emphasis added). After polling the jurors, the trial court stated, "Unless there is additional polling requested or some imperfection in the face of the verdict, I am going to discharge this jury." CP at 474. When neither counsel responded, the trial court discharged the jury.

Our Supreme Court ultimately reversed Brightman's conviction and remanded for a new trial, holding that his right to a public trial was violated when the trial court failed to comply with the *Bone-Club*[4] closure requirements before closing the courtroom to spectators during jury selection. *Brightman*, 155 Wn.2d at 526-27.

III. Brightman's Second Trial

In 2007, the State again tried Brightman for first degree murder. Prior to opening statements, defense counsel moved to preclude the State and its witnesses from referring to Villa as the "victim." 6 Report of Proceedings (RP) at 595. The trial court indicated that it preferred that Villa be referred to by name, but it did not prohibit the State or its witnesses from using the term. The following day, after the State and several of its witnesses used the term, the defense

[4] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

moved for a mistrial.[5] The trial court denied its motion, stating:

> [I]n this particular case, I don't believe that it is inaccurate to say that Mr. Villa was the victim of a shooting. In fact, that is not disputed. Whether it's accidental or not has yet to be proved, just like a person that was injured in an accident would be an accident victim, although that doesn't lead to a legal conclusion as to who's at fault. . . . [A]s I indicated yesterday . . . my preference is to refer to Mr. Villa as Mr. Villa. I think that's the most accurate, and I think that's the most respectful; however, to the extent that the term "victim" is used and not to draw a legal conclusion as to the guilt of Mr. Brightman, my ruling stands and the motion for mistrial is denied.

7 RP at 756-57. Defense counsel requested a curative instruction that the jury disregard the references to the term, which the trial court denied. The trial court did approve a standing objection.

At trial, the State presented a redacted version of Brightman's testimony from the first trial.[6] Brightman testified that during the fall of 1998, he had been working "off and on" for the Ron Owens Painting and Construction Company. 8 RP at 1089. He explained that he usually worked for Owens a couple days a week and that Owens had paid him in cash. He also testified that he did not go to work on the day of the shooting because he went to visit his grandmother in the hospital. Furthermore, Brightman testified regarding his financial situation, stating that in October 1998, he had only $36.28 in his bank account. The trial court admitted a bank statement reflecting this. Brightman explained that on the day in question, he attempted to withdraw $50 from his account but, when he was unable to do so, withdrew $40 instead. Brightman also

[5] Defense counsel also argued that he believed the trial court had already ruled in Brightman's favor on this issue during the first trial. The State responded that it did not recall what the previous trial court's decision regarding this issue was but that it was not binding on this trial court.

[6] The redacted version deleted phrasing indicating that Brightman had testified in an earlier trial.

testified that he did not own a car in October 1998, and that he had taken in roommates because he needed helping paying the rent.

The State subsequently offered Owens's testimony establishing that, contrary to Brightman's testimony, Brightman was not working for him during the time in question. Defense counsel moved to exclude this testimony, arguing that it was irrelevant and collateral because Brightman had not claimed that he was working on the day in question. The trial court denied the defense's motion, finding that Owens's testimony was relevant as to whether Brightman's financial situation provided him with a motive for robbery and its probative value outweighed "the prejudice of evidence that [he] was unemployed at the time." 5 RP at 462. Owens ultimately testified that he did not know Brightman or remember Brightman working for his company in 1998.

On the last day of its case in chief, the State informed the trial court that it had received a voicemail the night before from Michelle Vickery,[7] Brightman's former girlfriend and mother of two of his children. In the voicemail, Vickery indicated that she had information regarding Brightman's familiarity with guns and, in particular, the gun "he used to shoot Dexter Villa." 13 RP at 1683. The State sent defense counsel an email that night[8] and arranged for Vickery to be present for a defense interview the next morning, a Wednesday. The defense moved to recess the case until the following Monday or, in the alternative, to exclude Vickery's testimony. The trial

[7] At the time of the first trial, Vickery's last name was Ramirez. She did not testify at the first trial, as detectives made several attempts to contact her but "she was uncooperative and stated she did not have anything to say and did not want to get involved." 13 RP at 1682.

[8] Defense counsel claimed that he did not read the email before appearing in court that day.

court denied the motion, ruling that defense counsel had enough information[9] to begin cross-examination and that he could call Vickery back as a hostile witness and/or call rebuttal witnesses if necessary. It did, however, order that the State not put Vickery on the stand until the following morning.

Before deliberations, the trial court instructed the jury:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon kill, use deadly force, or use non-deadly force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then excusable homicide based on a lawful use of force to recover property is not available as a defense.

CP at 414. It did so, however, over defense counsel's objection:

> I don't have the WPICs [Washington Pattern Jury Instructions] in front of me now. I think we argued about it yesterday, and I thought that that language was not accurate, was not the language from the WPICs and would object to the giving of the entire instruction first and the language about kill or use deadly force. I don't believe deadly force is ever mentioned in the WPIC.

17 RP at 2174.

The jury found Brightman guilty of second degree murder. It also found that he was armed with a firearm during the commission of that crime. The trial court sentenced Brightman within the standard range to 275 months' confinement for the murder charge and an additional 60 months for the firearm enhancement, for a total sentence of 335 months' confinement. The trial court also sentenced him to 48 months' confinement for the firearm charge, to run concurrently.

[9] At that point, defense counsel had "a number of prior statements from the prior reports," a summary of Vickery's contact with the defense the previous night, and the information obtained during his interview with Vickery that morning. 13 RP at 1684. The State offered to "facilitate contact with any of the officers that [defense counsel needed] to call in to impeach her testimony." 13 RP at 1684.

Brightman now appeals.

ANALYSIS

Brightman asks that we reverse his second degree murder conviction and remand for a new trial, without a charge for first degree murder.

I. Double Jeopardy

Brightman first argues that retrial on his first degree murder charge violated double jeopardy because the trial court's discharge of the jury after it returned a verdict on second degree murder terminated his jeopardy as to first degree murder.[10] The State responds that Brightman's retrial did not violate double jeopardy, as he remained in continued jeopardy for first degree murder under our Supreme Court's decisions in *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006), and *State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007). The State's argument is persuasive.

We review questions of law de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. 5. The Washington State Constitution provides that "[n]o person shall be . . . twice put in jeopardy for the same offense." Const. art. I, § 9. Washington's clause provides the same protection as the federal clause. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following acquittal; (2) a second prosecution following conviction; and (3) multiple punishments for the same offense imposed in the same proceeding. *State v. Bobic*, 140 Wn.2d 250, 260-61, 996 P.2d 610 (2000). Generally, double jeopardy bars trial if three elements

[10] Brightman asserts that even though the jury did not convict him of first degree murder, "[we] cannot say whether the existence of the first degree murder charge . . . also made the jury less willing to consider his innocence on the second degree murder charge." Appellant's Br. at 23.

are met: (1) jeopardy previously attached, (2) jeopardy previously terminated, and (3) the defendant is again in jeopardy for the same offense. *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). The first two elements determine "former" jeopardy, which is a prerequisite to "double" jeopardy. *Corrado*, 81 Wn. App. at 645. When "former" jeopardy is assumed or established, the third element determines "double" jeopardy. *Corrado*, 81 Wn. App. at 645.

Generally, jeopardy attaches in a jury trial when the jury is sworn, and attaches in a bench trial when the first witness is sworn. *Corrado*, 81 Wn. App. at 646. As a general rule, jeopardy terminates with a verdict of acquittal. *Corrado*, 81 Wn. App. at 646. Jeopardy also terminates with a conviction that becomes unconditionally final, but not with a conviction that the defendant successfully appeals. *Corrado*, 81 Wn. App. at 647. A defendant's successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence, poses no bar to further prosecution on the same charge. *Corrado*, 81 Wn. App. at 647-48 (quoting *United States v. Scott*, 437 U.S. 82, 90-91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1970)). Furthermore, retrial following a "hung jury" does not normally violate the double jeopardy clause because this is another instance of continuing jeopardy. *Richardson v. U.S.*, 468 U.S. 317, 324, 104 S. Ct. 3081 (1984).

Jury silence can be construed as an acquittal and can therefore act to terminate jeopardy. *Daniels*, 160 Wn.2d at 262 (citing *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)). Such is not the case when a jury fails to agree and such disagreement is evident from the record. *Daniels*, 150 Wn.2d at 262 (citing *Ervin*, 158 Wn.2d at 753-54).

Our Supreme Court's decisions in *Ervin* and *Daniels* are instructive in this case. In *Ervin*,

the State charged the defendant and his co-defendant with aggravated first degree murder (count I), attempted first degree murder (count II), and second degree murder (count III) for their involvement in the shooting death of a Seattle police officer. 158 Wn.2d at 749. At the conclusion of the trial, the trial court instructed the jury that it was to first consider the crime of first degree murder and, if it unanimously agreed on a verdict, complete verdict form A. *Ervin*, 158 Wn.2d at 749. "If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A," the trial court instructed the jury. *Ervin*, 158 Wn.2d at 749. The trial court then gave the following instruction:

> If you find the defendant not guilty of the crime of [first degree murder], or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the alternative crime of [attempted first degree murder].

Ervin, 158 Wn.2d at 749-50.

The instructions went on to direct the jury to follow the same procedures for counts II and III and verdict forms B and C, respectively. *Ervin*, 158 Wn.2d at 750. After five weeks of deliberations, the jury announced that it was unable to reach a unanimous verdict. The trial court asked the jury to continue deliberating, which it did for two more days. *Ervin*, 158 Wn.2d at 750. Although it was unable to reach a unanimous verdict on any of the charges against Ervin's co-defendant, the jury found Ervin guilty of second degree murder. *Ervin*, 158 Wn.2d at 750.

The jury did not fill in the blanks to indicate "guilty" or "not guilty" on Ervin's verdict forms A and B for counts I and II. *Ervin*, 158 Wn.2d at 750-51. Rather, someone put a slash mark through the forms and wrote "not used." *Ervin*, 158 Wn.2d at 750-51. The trial court decided to end deliberations and discharge the jury after reading the verdict for Ervin. *Ervin*, 158

Wn.2d at 750.

Ervin successfully vacated that conviction on the basis that it could not be predicated on assault. *Ervin*, 158 Wn.2d at 751. The State subsequently sought to retry Ervin for aggravated first degree murder and attempted first degree murder. Ervin asked that the charges be dismissed on double jeopardy principles. *Ervin*, 158 Wn.2d at 751. The Supreme Court granted discretionary review to answer the following question: whether jeopardy had terminated on the charges of aggravated first degree murder and attempted first degree murder, thereby barring the State from retrying Ervin on these charges. *Ervin*, 158 Wn.2d at 752.

The court first noted that it has held that if a jury considering multiple charges renders a verdict as to one of the charges but is silent on the other charge, such action constitutes an implied acquittal barring retrial on those charges. *Ervin*, 158 Wn.2d at 753. The court then went on to state, however, that juries are presumed to follow the instructions provided:

> Here . . . the jury was instructed to leave the verdict forms blank if it was unable to agree on a verdict for each particular charge. The jury did just that on verdict forms A and B. Thus, we may logically conclude that the jury could not agree on a verdict for the crimes of aggravated [first degree murder] or attempted [first degree murder]. The instructions and verdict forms are a part of the record. Both the United States Supreme Court and this court have found that "where a jury ha[s] not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record," the implied acquittal doctrine does not apply.

Ervin, 158 Wn.2d at 756-57 (citations omitted).

Therefore, the court explained, even without any inquiry by the trial court, the blank forms indicate on their face that the jury was unable to agree. *Ervin*, 158 Wn.2d at 757. It then held that because the jurors were unable to agree, it could not consider them to have acquitted Ervin of

the greater charges; therefore, Ervin had no acquittal operating to terminate jeopardy. *Ervin*, 158 Wn.2d at 757. Because Ervin successfully vacated his conviction, it held, jeopardy had not terminated and double jeopardy did not bar retrial on the greater charges. *Ervin*, 158 Wn.2d at 758-59.

In *Daniels*, the State charged the defendant with homicide by abuse and second degree murder, predicated on either assault or criminal mistreatment, after the death of her son. 160 Wn.2d at 259. Like the trial court in *Ervin*, the trial court in this case instructed the jury to fill in verdict form A if it unanimously agreed on a verdict as to the homicide by abuse charge; otherwise, it was to leave it blank. *Daniels*, 160 Wn.2d at 260. If the jury either found Daniels not guilty of homicide by abuse or could not agree as to that charge, the jury was instructed to consider the second degree murder charge. *Daniels*, 160 Wn.2d at 260.

The jury left verdict form A blank but found Daniels guilty of second degree murder. *Daniels*, 160 Wn.2d at 260. We reversed Daniels's murder conviction because it was predicated on assault and held that the State could recharge her on murder predicated on criminal mistreatment but could not retry her on the homicide by abuse charge because the jury's silence acted as an implied acquittal.[11] *Daniels*, 160 Wn.2d at 261. Our Supreme Court was asked to decide whether the State could retry Daniels without violating double jeopardy. Noting that the issue before it in *Daniels* was "nearly identical" to the issue it considered in *Ervin*, the court held that jeopardy did not terminate on Daniels's homicide by abuse charge and that she could be retried. *Daniels*, 160 Wn.2d at 264-65.

[11] The Supreme Court had not yet decided *Ervin* when we made our decision in *Daniels*. *Daniels*, 160 Wn.2d at 261.

Like the trial courts in *Ervin* and *Daniels*, the trial court in this case instructed the jury to leave verdict form A blank if it was unable to agree on a verdict for first degree murder. The jury left verdict form A blank and instead completed verdict form B, which stated:

> We, the jury, having found the defendant: (1) not guilty of the crime of [first degree murder], or (2) having found the defendant not guilty of the crime of [first degree felony murder], and being unable to unanimously agree as to [premeditated first degree murder], find the defendant *Guilty* (not Guilty or Guilty) of the lesser included crime of [second degree murder].

CP at 18 (emphasis added).

As the Supreme Court stressed in *Ervin*, juries are presumed to follow the trial court's instructions. 158 Wn.2d at 756. The jury in this case left verdict form A blank and instead found Brightman guilty of second degree murder. Under *Ervin* and *Daniels*, the blank verdict form indicates on its face that the jury was unable to agree on a verdict for first degree murder. Therefore, in this case, there was no acquittal operating to terminate this charge. Brightman asserts that because the trial court "made no further inquiry after the jury's statement that it was deadlocked, the record does not establish that the jury was genuinely deadlocked." Appellant's Br. at 22. He fails, however, to establish that the trial court was required to do this in this case, and his argument that the defense did not actually consent to the jury's discharge is unpersuasive. Brightman successfully vacated his second degree conviction on appeal; retrial on the greater charge of first degree murder did not violate double jeopardy in this case.

II. Use of Term "Victim"

Brightman next argues that the trial court erred by permitting the State and its witnesses to refer to Villa as the "victim."[12] He contends that repeated references to Villa as the "victim"

invaded the jury's province, violated the presumption of innocence, and denied him a fair trial. The State correctly responds that Brightman has failed to demonstrate that use of this term constituted improper opinion testimony or that the trial court abused its discretion by allowing its use at trial.

We review both the trial court's denial of a motion for mistrial and its decision to admit evidence for abuse of discretion.[13] *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (quoting *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)).

A witness may not give, directly or by inference, an opinion on a defendant's guilt. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (citing *State v. Madison*, 53 Wn. App. 754, 760, 770 P.2d 662 (1989)). To do so is to violate the defendant's constitutional right to a jury trial and invade the jury's fact-finding province. *Dolan*, 118 Wn. App. at 329 (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). In determining whether statements are in fact impermissible opinion testimony, the court will generally consider the circumstances of the case, including the following factors: (1) the type of witness involved; (2) the specific nature of

[12] Although Brightman appears to argue that the prosecutor's references to Villa as the "victim" also violated his right to a fair trial, the core of his argument both below and on appeal characterizes the witnesses' use of the term as opinions on his guilt. Therefore, our analysis focuses on this testimony.

[13] It is unclear whether Brightman is appealing the trial court's ruling on his motion in limine, its ruling on his motion for mistrial, or its ruling admitting what he has deemed improper opinion testimony. In any case, we review all of these rulings for abuse of discretion. *See also State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 759 (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). Given that improper opinion testimony violates the constitutional right to a jury trial, it must be harmless beyond a reasonable doubt. *Dolan*, 118 Wn. App. at 330.

Brightman's reliance on the Delaware Supreme Court's decision in *Jackson v. State*, 600 A.2d 21 (Del. 1991), is misplaced. In that case, a jury convicted Jackson of, among other things, two counts of first degree unlawful sexual intercourse. *Jackson*, 600 A.2d at 22. On appeal, Jackson argued that the trial court erred by allowing the prosecutor to refer to the complaining witness as the "victim," claiming that the use of the word compromised the fact-finding role of the jury. *Jackson*, 600 A.2d at 24. Because consent was his sole defense, he argued, the reference assumed that a crime had been committed and the sexual acts were nonconsensual, therefore conveying to the jury a conclusion of guilt. *Jackson*, 600 A.2d at 24. The court held that "[a]lthough the term should be avoided in the questioning of witnesses in situations where consent is an issue, its use in this case, without objection, does not constitute plain error." *Jackson*, 600 A.2d at 25. That court has since stated that its statement in *Jackson* regarding use of the term was limited to much narrower circumstances (i.e. rape cases where consent is the sole defense). *See Allen v. State*, 644 A.2d 982, 983 n.1 (Del. 1994).

Furthermore, Brightman fails to cite to Washington authority in support of his contention that "[c]alling the deceased a victim is just as wrong as calling the defendant a criminal," or that its use in cases where consent is not an issue constitutes reversible error. Appellant's Br. at 27.

Using the term "victim" may imply that a crime has taken place; however, it does not imply that a defendant is the victimizer; thus, it does not constitute an opinion that he was guilty of the charged crime. The term "victim" "applies to anyone who suffers either as a result of ruthless design or incidentally or accidentally." Webster's Third New Int'l Dictionary at 2550 (2002). Moreover, the record indicates that witnesses used the term "victim" generally as a term of art by those working in law enforcement (i.e. a retired police officer, a crime scene investigator). As in the case of *Jackson*, the limited use of the word as a law enforcement term is not inherently prejudicial unless it is used repeatedly and gratuitously. The record does not demonstrate that this was the case here.

After the trial court denied Brightman's motion for a mistrial, it appears that approximately five State witnesses—all of whom worked in or closely to law enforcement—used this term only a few more times.[14] Finally, the trial court subsequently instructed the jury:

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP at 394. We presume that a jury follows the trial court's instructions. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) (citing *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). Brightman has failed to show that the trial court erred by allowing use of the term at trial or that its use so prejudiced him as to deny him a fair trial.

III. Impeachment on Collateral Issues

[14] Brightman also cites to report of proceedings at 951, 1175, 2048 as examples of witnesses using the term "victim." The record reflects, however, that the prosecutor used the term in those instances, not witnesses. The prosecutor's use of this term was infrequent and limited to a few questions.

Brightman next argues that the trial court erred by admitting Owens's testimony to impeach him on a collateral matter. Brightman contends that this evidence was prejudicial because it "invited the jury to draw the impermissible inference that because he was unemployed he was more likely to commit a crime." Appellant's Br. at 35. The State responds that the trial court did not abuse its discretion by admitting this evidence as it was relevant to Brightman's financial motive for committing the crime. Again, the State's argument is persuasive.

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A witness cannot be impeached on matters collateral to the principal issues being tried. *State v. Oswalt*, 62 Wn.2d 118, 120, 381 P.2d 617 (1963). The purpose of the rule is basically two-fold: (1) avoiding undue confusion of issues, and (2) preventing unfair advantage over a witness unprepared to answer concerning matters unrelated or remote to the issues at hand. *Oswalt*, 62 Wn.2d at 121 (citing *State v. Fairfax*, 42 Wn.2d 777, 258 P.2d 1212 (1953); 3 Wigmore on Evidence (3d ed.) § 1002, p. 656)).

An issue is collateral if it is not admissible independent of the impeachment purpose. *Oswalt*, 62 Wn.2d at 121. Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence. Motive is the impulse that tempts or induces a mind to commit a crime. *Powell*, 126 Wn.2d at 259-60 (quoting *State v. Tharp*, 96 Wn.2d 591, 597, 637

P.2d 961 (1981)). Evidence of a defendant's financial condition may be relevant to showing motive. *State v. Matthews*, 75 Wn. App. 278, 286-87, 877 P.2d 252 (1994).

The trial court relied on *Matthews* in denying Brightman's motion. Both parties also rely on this case to support their respective positions on appeal. There, a jury convicted Matthews of first degree murder. *Matthews*, 75 Wn. App. at 279. On appeal, Matthews argued that the trial court abused its discretion by admitting evidence of his financial situation and recent bankruptcy in support of the State's theory that Matthews had a financial motive to commit what began as a robbery but ended in a murder. *Matthews*, 75 Wn. App. at 284.

Division One of this court held that the trial court did not abuse its discretion by allowing this evidence, stating that it "was presented as a foundation for other evidence that Matthews was living beyond his means at the time of the murder." *Matthews*, 75 Wn. App. at 284. From this evidence, the court explained, the State crafted its theory that the murder was the result of an interrupted robbery by a financially pressured man. *Matthews*, 75 Wn. App. at 284.

"Living beyond one's means could reasonably provide a motive for robbery, which in turn could reasonably provide a motive for murder of the robbery victim," the court stated. *Matthews*, 75 Wn. App. at 284. Addressing prejudice under ER 403, the court stated:

> We agree with Matthews that poor people are not more likely to steal than are people of higher income levels. However, here, the focus of the evidence was not on poverty, but rather on the fact that the lifestyle of Matthews and his family seemingly exceeded the family's income . . . The State's presentation of this evidence was sufficiently limited so that any stigma of bankruptcy or poverty was not made a point of primary focus for the jury.

Matthews, 75 Wn. App. at 286.

Although the State did not present evidence that Brightman was necessarily living beyond

his means in this case, *Matthews* is nonetheless instructive. Brightman testified that, during the fall of 1998, he worked "off and on," had little savings, did not own a car, and lived with roommates to help pay his rent. The State then offered Owens's testimony to refute Brightman's claim that he was working for and earning money from Owens during this time. This evidence, as a whole, tended to establish a financial motive for robbing Villa and taking his vehicle; therefore, it was clearly relevant under ER 401.

Furthermore, Brightman has not demonstrated that this testimony was so prejudicial as to outweigh its probative value. The trial court likely considered *Matthews's*, warning that this type of evidence should be admitted with caution in determining that it was not prejudicial under ER 403. 75 Wn. App. at 286. Like the evidence in *Matthews*, Owens's testimony in this case was bolstered by and cumulative of other evidence that established "more than the mere fact that the defendant [was] poor." 75 Wn. App. 287. It established that Brightman was struggling to make ends meet and did not, as he previously testified, have a legitimate source of income to alleviate his financial burden at the time of the shooting. The record demonstrates that the State did not exploit this fact in a manner that would have prejudiced Brightman. The trial court did not err by admitting this evidence.

IV. Motion for a Continuance

Brightman next argues that the trial court denied him due process by admitting newly discovered evidence—Vickery's testimony—without affording the defense an adequate opportunity to investigate. The State responds that Brightman has failed to demonstrate that the trial court abused its discretion by denying the defense's request when it "employed other means

to allow [Brightman] time to prepare for cross-examination." Resp't's Br. at 23. The trial court did not abuse its discretion with respect to this issue.

The decision to grant or deny a motion for a continuance rests within the trial court's sound discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (citing *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970)). We will not disturb the trial court's decision unless the appellant makes a clear showing that the trial court's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Downing*, 151 Wn.2d at 272. In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *Downing*, 151 Wn.2d at 273.

Our Supreme Court has recognized "that failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case." *Downing*, 151 Wn.2d at 274 (quoting *State v. Williams*, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975)). Additionally, denying a request for a continuance may violate a defendant's right to compulsory process if the denial prevents the defendant from presenting a witness material to his defense. *Downing*, 151 Wn.2d at 274-75 (citing *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974)). Whether the denial of a continuance amounts to a constitutional violation requires a case by case inquiry. *Downing*, 151 Wn.2d at 275 (citing *Eller*, 84 Wn.2d at 96). When denial of a motion to continue allegedly violates constitutional due process rights, the appellant must show either prejudice by the denial or that the result of the trial would have differed had the continuance been granted. *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

Brightman has failed to demonstrate that the trial court abused its discretion by denying his motion for a continuance. As previously mentioned, the State received a voicemail from Vickery the night before the last day of its case in chief. It sent defense counsel an email that night and arranged for Vickery to be present for a defense interview the next morning. When the State informed the trial court of this development the next day, the defense moved to recess the case until the following Monday or, in the alternative, to exclude Vickery's testimony.

When the trial court stated that it was not willing to suspend trial for three days, defense counsel stated, "[A]t least let me have one day then." 13 RP at 1686. The trial court denied the motion, ruling that defense counsel had enough information to begin cross-examination and that he could call Vickery back as a hostile witness and/or call rebuttal witnesses if necessary. When defense counsel renewed his motion for a continuance, the trial court again denied his motion but ordered that the State not put Vickery on the stand until the following morning. It also placed parameters on Vickery's testimony: it precluded any discussion regarding domestic violence that may have occurred between Brightman and Vickery under ER 404(b) or speculation as to why Brightman may have had guns ("he always wanted to be a big man").[15] 14 RP at 1771. Defense counsel subsequently called several witnesses to the stand, none of whom he used to impeach Vickery.

The record demonstrates that the trial court determined that the defense had enough information to begin cross-examination; furthermore, it offered the defense several options as to

[15] The trial court ruled that Vickery's testimony went to "the issue of intent, knowledge, and lack of mistake or accident under [ER 404(b)]." 14 RP at 1771.

how it could rebut Vickery's testimony if necessary. In light of the above facts, its decision to deny Brightman's motion for a continuance was not based on untenable grounds. Brightman fails to demonstrate that any additional time would have allowed the defense to more effectively cross-examine Vickery or rebut her testimony.

Moreover, Brightman's assertion that the trial court's ruling resulted in actual prejudice, as Vickery's testimony "allowed the jury to infer it was less likely he would accidentally discharge a gun," is insufficient. Appellant's Br. at 43. Brightman did not argue that he was unfamiliar with guns or that he was unaware that it might discharge if he struck someone with it; rather, he testified that he had the gun clip in his pocket and did not know there was a bullet in the chamber when the gun discharged. *Brightman*, 155 Wn.2d at 510. Vickery's testimony did not contradict this theory. That the jury may have weighed Vickery's testimony in the State's favor does not establish that the trial outcome would have differed had the trial court granted Brightman's motion. Brightman has failed to demonstrate that the trial court's ruling constituted an abuse of discretion or that it rose to the level of a constitutional violation.

Finally, Brightman's reliance on our decision in *State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980), is misplaced. In that case, the State charged the defendant with the first degree stabbing murder of his girlfriend. *Oughton*, 26 Wn. App. at 75. On the third day of trial, the victim's son for the first time informed the prosecutor that, shortly after his mother's death, he looked through her clothes and found that they had been slashed or cut and spray-painted gold. *Oughton*, 26 Wn. App. at 78. The prosecuting attorney did not inform defense counsel or the trial court of this new information. It was revealed only when the son testified that afternoon.

Oughton, 26 Wn. App. at 78.

The defense objected on grounds of relevance and surprise and moved for a continuance, both of which the trial court denied. *Oughton*, 26 Wn. App. at 78. We held that because the prosecutor failed in the first instance to comply with the discovery rules and because the defendant was then denied any reasonable opportunity to investigate and rebut newly discovered information, the defendant was denied his right to a fair and unbiased trial. *Oughton*, 26 Wn. App. at 80. Unlike the prosecutor in *Oughton*, the prosecutor in this case informed the defense that Vickery intended to testify and arranged for a defense interview the next morning. The trial court then instructed the State to wait a day before putting Vickery on the stand and gave him several options for addressing her testimony later in trial. In fact, Brightman had an entire weekend to locate and interview potential rebuttal witnesses. Brightman's assertion that he "needed more time to follow up on potential areas of impeachment" is insufficient. Appellant's Br. at 41.

V. Aggressor Instruction

Brightman next argues that the trial court erred by submitting an aggressor instruction to the jury because it deprived him of his ability to argue excusable homicide.[16] Furthermore, Brightman contends, there was no evidence that he was the aggressor and the instruction "unfairly bolstered the [S]tate's argument."[17] Appellant's Br. at 48. The State responds that Brightman

[16] Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any lawful intent. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 15.01, at 228 (3d. ed. 2008).

[17] Brightman asserts that an aggressor instruction "applies when self defense is asserted as to the crime charged" and argues that the trial court should not have instructed the jury as it did because

has failed to preserve his argument that there was insufficient factual support for the giving of this instruction, as defense counsel did not object on this basis below. It appears that Brightman failed to preserve this issue for our review; moreover, his substantive argument fails.

As previously noted, the trial court submitted the following instruction at the State's request:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon kill, use deadly force, or use non-deadly force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then excusable homicide based on a lawful use of force to recover property is not available as a defense.

CP at 414. Although defense counsel stated his objection "to the giving of the entire instruction first," and then to the "kill or use deadly force" language, he did not make a specific objection based on insufficient evidence. 17 RP at 2174. "An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (citing *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976)); *see* CrR 6.15. Therefore, it appears that Brightman has waived this issue on appeal. Even if defense counsel had properly objected below, however, Brightman has failed to demonstrate that the trial court abused its discretion by submitting this instruction to the jury.

"A trial court's refusal to give a requested instruction, when based on the facts of the case, is a matter of discretion and will not be disturbed on review except upon a clear showing of abuse of discretion[;]" however, "[w]hen . . . a trial court's decision regarding a jury instruction is

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he "was not contending he killed Villa in self defense." Appellant's Br. at 44.

'predicated upon rulings as to the law,' . . . it is reviewed de novo for error of law." *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996) (quoting *Braden v. Rees*, 5 Wn. App. 106, 110, 485 P.2d 995 (1971), *overruled on different point*, 133 Wn.2d 541, 947 P.2d 700 (1997). Here, the trial court ruled that the aggressor instruction was "an accurate statement of the law." 17 RP at 2173. Brightman does not discuss this ruling in any depth on appeal.[18] Rather, he argues that the facts of the case do not support the trial court's decision.

Where there is credible evidence from which a jury could reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999) (citing *State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986); *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990)). If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports giving an aggressor instruction. *Riley*, 137 Wn.2d at 910 (citing *State v. Thompson*, 47 Wn. App. 1, 7, 733 P.2d 584 (1987)). An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. *Riley*, 137 Wn.2d at 910 (citing *State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)). When determining if the evidence at trial was sufficient to support giving an instruction, we view the supporting evidence in the light most favorable to the party that requested the instruction. *State*

[18] Instructions regarding self defense may be relevant even where the defense is raising a claim of excusable homicide. *See Brightman*, 155 Wn.2d at 525, n. 13; *State v. Callahan*, 87 Wn. App. 925, 932-33, 943 P.2d 676 (1997). Brightman fails to cite to authority in support of his contention that this instruction is unavailable where the defendant's defense is excusable homicide. "[We] will not review issues for which inadequate argument has been briefed or only passing treatment has been made." *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)).

v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

In this case, three eyewitnesses testified at trial. One witness testified that Brightman and Villa each remained on their feet, and it seemed to be a fair fight. *Brightman*, 155 Wn.2d at 509. Another testified that Villa looked like he was trying to get away but that Brightman was holding onto Villa's shirt. *Brightman*, 155 Wn.2d at 509-10. The third testified that he saw Villa waive his hands in fear. *Brightman*, 155 Wn.2d at 510. Each witness saw Brightman shoot Villa. *Brightman*, 155 Wn.2d at 510. Although all three witnesses saw Brightman shoot Villa, the evidence as to whose conduct actually precipitated the fight was ambiguous at best. Therefore, viewing the evidence in light most favorable to the State, the trial court's decision to give an aggressor instruction was not improper. Furthermore, Brightman fails to demonstrate that the instruction actually prevented him from effectively arguing his theory of excusable homicide.

VI. Cumulative Error

Brightman next argues that the cumulative error doctrine warrants reversal in this case. The State asserts that Brightman has failed to establish an accumulation of prejudicial error. The State is correct.

The cumulative error doctrine applies only when several errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Brightman has failed to meet his burden.

VII. SAG

Finally, Brightman argues that the trial court "abused [its] discretion and denied [him] his due process rights to a fair trial under the 14th Amendment to the United States Constitution" by admitting Vickery's testimony. SAG at 2. Brightman's arguments that this evidence was inadmissible under ERs 401, 403, and 404(b) are without merit. He has failed to establish that the trial court's decision regarding this evidence constituted an abuse of discretion.

We affirm Brightman's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Houghton, J.

Bridgewater, J.